IN THE

Supreme Court of the United States

October Term, 1974

No. 73-1968

Office-Supreme Court
FILED
JUL 2 1974
MICHAEL RODAK, JR.

ARTHUR GROSS, JOSEPH LERMAN and ROSE LERMAN, on behalf of themselves and all other individual mutual fund shareholders similarly situated,

Petitioners

v.

THE NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., MASSACHUSETTS INVESTORS GROWTH STOCK FUND, INC., FIDELITY FUND, INC., WELLINGTON FUND, INC., THE CROSBY CORPORATION, VANCE, SANDERS & COMPANY, INC., THE WELLINGTON MANAGEMENT COMPANY, INC., MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., BACHE & COMPANY, INC., REYNOLDS SECURITIES CORPORATION, F. I. duPONT, GLORE FORGAN, INC., E. F. HUTTON, INC., WALSTON & COMPANY, INC., DEAN WITTER & COMPANY, INC., PAINE, WEBBER, JACKSON & CURTIS, INC., HORNBLOWER & WEEKS-HEMPHILL, NOYES, INC.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS DISTRICT OF COLUMBIA CIRCUIT

DAVID BERGER
H. LADDIE MONTAGUE, JR.
JOEL C. MERIDITH
PAUL J. McMAHON
1622 Locust Street
Philadelphia, Pa. 19103

and

CHARLES JAY PILZER
Suite 902
1101 17th Street, N.W.
Washington, D.C. 20036

and

IRA JAY SANDS
Suite 900
701 7th Avenue
New York, N.Y. 10036
Counsel for Petitioners

Of Counsel:
DAVID BERGER, P.A.,
Attorneys-at-Law

THE LEGAL INTELLIGENCER, 69 NORTH JUNIPER STREET, PHILA., PA. 19107

TABLE OF CONTENTS

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	3
Statement of the Case	8
Reasons for Granting the Writ	10
Conclusion	13
Appendix:	
Order of the District Court	A1
Opinion of the District Court	A3
Pretrial Order No. 1	A40
Order of the Court of Appeals	A43

TABLE OF CITATIONS

Cases:

Greene v. McElroy, 360 U.S. 474 (1959)	11
Hannah v. Larche, 363 U.S. 420 (1960)	10
New Haven Inclusion Cases, 399 U.S. 418 (1970)	11
Roe v. Wade, 410 U.S. 113 (1973)	11
Taylor v. McElroy, 360 U.S. 709 (1959)	11
United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966)	11
United States v. Topco Associates, Inc., 405 U.S. 596 (1972)	12

Statutes:

15 U.S.C. §1	3
15 U.S.C. §80-a	3
28 U.S.C. §1253	10
28 U.S.C. §1254	2

IN THE

Supreme Court of the United States

October Term, 1974

No.

Arthur Gross, Joseph Lerman and Rose Lerman on behalf of themselves and all other individual mutual fund shareholders similarly situated, *Petitioners*

v.

The National Association of Securities Dealers, Inc., Massachusetts Investors Growth Stock Fund, Inc., Fidelity Fund, Inc., Wellington Fund, Inc., The Crosby Corporation, Vance, Sanders & Company, Inc., The Wellington Management Company, Inc., Merrill Lynch, Pierce, Fenner & Smith, Inc., Bache & Company, Inc., Reynolds Securities Corporation, F. I. duPont, Glore Forgan, Inc., E. F. Hutton, Inc., Walston & Company, Inc., Dean Witter & Company, Inc., Paine, Webber, Jackson & Curtis, Inc. , Hornblower & Weeks-Hemphill, Noyes, Inc., *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS DISTRICT OF COLUMBIA CIRCUIT

Petitioners, plaintiffs in the proceedings below, respectfully pray that a writ of certiorari issue to review the order of the United States District Court for the District of Columbia dismissing the complaint entered on December 14, 1973.

OPINION BELOW

The Order and Opinion of the District Court for the District of Columbia dismissing the complaint on December 14, 1973, are reported at 1973-2 Trade Cases ¶74,841 and are reprinted in the Appendix, pp. A1 to A39.

JURISDICTION

The Order of the District Court for the District of Columbia dismissing the complaint was entered on December 14, 1973. Petitioners filed their notice of appeal on January 3, 1974, and the appeal was docketed in the Court of Appeals on March 18, 1974. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) and Rule 20 of this Court which provide that cases pending in the Court of Appeals may be reviewed by this Court before rendition of judgment.

QUESTIONS PRESENTED

Whether the resale price maintenance required in primary distribution by Section 22(d) of the Investment Company Act of 1940 exempts from the antitrust laws combinations and agreements to suppress competition in secondary markets for outstanding mutual fund shares involving sales between dealers or sales between investors made through brokers?

Whether Section 22(f) of the Investment Company Act of 1940 creates an exemption from the antitrust laws for such combinations and agreements?

Whether the Investment Company Act of 1940 and the Maloney Act create a regulatory scheme so pervasive that it impliedly exempts all possible restraints in the distribution and sale of mutual fund shares?

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act (15 U.S.C. §1) reads in relevant part as follows:

> 1. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

Section 22 of the Investment Company Act of 1940 [15 U.S.C. §80-a] reads as follows:

> 22(a) "A securities association registered under 78o-3 of this title may prescribe, by rules adopted and in effect in accordance with said section and subject to all provisions of said section applicable to the rules of such an association—
>
> (1) a method or methods for computing the minimum price at which a member thereof may purchase from any investment company any redeemable security issued by such company and the maximum price at which a member may sell to such company any redeemable security issued by it or which he may receive for such security upon redemption, so that the price in each case will bear such relation to the current net asset value of such security computed as of such time as the rules may prescribe; and
>
> (2) a minimum period of time which must elapse after the sale or issue of such security before any resale to such company by a member or its redemption upon surrender by a member;
>
> in each case for the purpose of eliminating or reducing so far as reasonably practicable any dilution of the value of other outstanding securities of such company or any other result of such purchase, redemption, or sale which is unfair to holders of such other outstanding securities; and said rules may prohibit the members of the association from purchasing,

selling, or surrendering for redemption any such redeemable securities in contravention of said rules.

(b)(1) Such a securities association may also, by rules adopted and in effect in accordance with section 78o-3 of this title, and not withstanding the provisions of subsection (b)(8) thereof but subject to all other provisions of said section applicable to the rules of such an association, prohibit its members from purchasing, in connection with a primary distribution of redeemable securities of which any registered investment company is the issuer, any such security from the issuer or from any principal underwriter except at a price equal to the price at which such security is then offered to the public less a commission, discount, or spread which is computed in conformity with a method or methods, and within such limitations as to the relation thereof to said public offering price, as such rules may prescribe in order that the price at which such security is offered or sold to the public shall not include an excessive sales load but shall allow for reasonable compensation for sales personnel, broker-dealers, and underwriters, and for reasonable sales loads to investors. The Commission shall on application or otherwise, if it appears that smaller companies are subject to relatively higher operating costs, make due allowance therefor by granting any such company or class of companies appropriate qualified exemptions from the provisions of this section.

(2) At any time after the expiration of eighteen months from December 14, 1970, or after a securities association has adopted rules as contemplated by this subsection, the Commission may make such rules and regulations pursuant to section 78o(b)(10) of this title as are appropriate to effectuate the purpose of this subsection with respect to sales of shares of a registered investment company by broker-dealers subject to regulation under section 78o(b)(8) of this title:

Provided, That the underwriter of such shares may file with the Commission at any time a notice of election to comply with the rules prescribed pursuant to this subsection by a national securities association specified in such notice, and thereafter the sales load shall not exceed that prescribed by such rules of such association, and the rules of the Commission as hereinabove authorized shall thereafter be inapplicable to such sales.

(3) At any time after the expiration of eighteen months from December 14, 1970 (or, if earlier, after a securities association has adopted for purposes of paragraph (1) any rule respecting excessive sales loads), the Commission may alter or supplement the rules of any securities association as may be necessary to effectuate the purposes of this subsection in the manner provided by section 78o-3(k)(2) of this title.

(4) If any provision of this subsection is in conflict with any provision of any law of the United States in effect on December 14, 1970, the provisions of this subsection shall prevail.

(c) The Commission may make rules and regulations applicable to registered investment companies and to principal underwriters of, and dealers in, the redeemable securities of any registered investment company, whether or not members of any securities association, to the same extent, covering the same subject matter, and for the accomplishment of the same ends as are prescribed in subsection (a) of this section in respect of the rules which may be made by a registered securities association governing its members. Any rules and regulations so made by the Commission, to the extent that they may be inconsistent with the rules of any such association, shall so long as they remain in force supersede the rules of the association and be binding upon its members as well as all other underwriters and dealers to whom they may be applicable.

(d) No registered investment company shall sell any redeemable security issued by it to any person except either to or through a principal underwriter for distribution or at a current public offering price described in the prospectus, and, if such class of security is being currently offered to the public by or through an underwriter, no principal underwriter of such security and no dealer shall sell any such security to any person except a dealer, a principal underwriter, or the issuer, except at a current public offering price described in the prospectus. Nothing in this subsection shall prevent a sale made (i) pursuant to an offer of exchange permitted by section 80a-11 of this title including any offer made pursuant to section 80a-11(b) of this title, (ii) pursuant to an offer made solely to all registered holders of the securities, or of a particular class or series of securities issued by the company proportionate to their holdings or proportionate to any cash distribution made to them by the company (subject to appropriate qualifications designed solely to avoid issuance of fractional securities); or (iii)—in accordance with rules and regulations of the Commission made pursuant to subsection (b) of section 80a-12 of this title.

(e) No registered investment company shall suspend the right of redemption or postpone the date of payment or satisfaction upon redemption of any redeemable security in accordance with its terms for more than seven days after the tender of such security to the company or its agent designated for that purpose for redemption except—

(1) , for any period (A) during which the New York Stock Exchange is closed other than customary weekend and holiday closings or (B) during which trading on the New York Stock Exchange is restricted;

(2) for any period during which an emergency exists as a result of which (A) disposal by the company of securities owned by it is not reasonably prac-

ticable or (B) it is not reasonably practicable for such company fairly to determine the value of its net assets; or

(3) for such other periods as the Commission may by order permit for the protection of security holders of the company.

The Commission shall by rules and regulations determine the conditions under which (i) trading shall be deemed to be restricted and (ii) an emergency shall be deemed to exist within the meaning of this subsection. Any company which, as of March 15, 1940, was required by provision of its charter, certificate of incorporation, articles of association, or trust indenture, or of a bylaw or regulation duly adopted thereunder, to postpone the date of payment or satisfaction upon redemption of redeemable securities issued by it, shall be exempt from the requirements of this subsection; but such exemption shall terminate upon the expiration of one year from the effective date of this subchapter, or upon the repeal or amendment of such provision, or upon the sale by such company after March 15, 1940, of any security (other than short-term paper) of which it is the issuer, which ever first occurs.

(f) No registered open-end company shall restrict the transferability or negotiability of any security of which it is the issuer except in conformity with the statements with respect thereto contained in its registration statement nor in contravention of such rules and regulations as the Commission may prescribe in the interests of the holders of all of the outstanding securities of such investment company.

(g) No registered open-end company shall issue any of its securities (1) for services; or (2) for property other than cash or securities (including securities of which such registered company is the issuer), except as a dividend or distribution to its security holders or in connection with a reorganization.

STATEMENT OF THE CASE

This case was instituted as a class action in the United States District Court for the District of Columbia by the filing of a complaint on March 5, 1973. Plaintiffs, Arthur Gross, Joseph Lerman and Rose Lerman are investors in mutual funds who allege that defendants, several mutual funds, principal underwriters, broker/dealers and the National Association of Securities Dealers (the "NASD" herein) conspired to restrict the distribution of mutual fund shares. The complaint alleges that the defendants prevented distribution of mutual fund shares except through the "primary distribution system". In the primary distribution system, each purchase of mutual fund shares is effected by the mutual fund issuing a new share and distributing it to the purchaser through the principal underwriter and a broker/dealer under contract with the principal underwriter. The commission charged to an investor for this transaction is typically 7.5 to 8.5%. When an investor sells a mutual fund share, the share is returned to the fund for redemption.

The plaintiffs allege that the defendants prohibited and continue to prohibit the development of other markets for mutual fund shares. Such markets, which exist for other types of securities, include a brokerage market (in which broker/dealers act as agents for investors who sell mutual fund shares to other investors) and a secondary dealer market (in which a broker/dealers purchase mutual fund shares from investors for their own accounts).

It is alleged that defendants restricted the development of brokerage and secondary dealer markets for mutual fund shares by, *inter alia*, establishing NASD rules which inhibited development of such markets, establishing NASD rules which induced broker/dealers to enter into restrictive sales agreements with principal underwriters, distributing misleading information concerning the legality of a brokerage market, and suppressing market quotations for the secondary dealer market.

This case was assigned to the Honorable Howard F. Corcoran of the United States District Court for the District of Columbia. Judge Corcoran entered pretrial orders in this case and in two related cases, *Haddad v. Crosby Corp.*, C.A. No. 2454-72, and *United States v. National Association of Securities Dealers*, C.A. No. 338-73, which ordered pretrial proceedings in the three cases to proceed in unison. The Pretrial Order entered in this case is reprinted in the Appendix, pp. A40 to A43. Pursuant to these Orders, defendants simultaneously moved to dismiss the complaints in the three cases. The motions to dismiss were answered simultaneously by the plaintiffs. Oral argument on the motions to dismiss the complaints in the three cases was held on August 3, 1973. On December 14, 1973, Judge Corcoran, with one opinion, granted defendants' motions and dismissed the three complaints (Appendix pp. A1 to A39).

The petitioners herein timely noticed their appeal of the Order of December 14, 1973, to the Circuit Court of Appeals for the District of Columbia Circuit and the appeal was docketed on March 18, 1974. The Government, pursuant to Section 2 of the Expediting Act (15 U.S.C. §29), has appealed the Order of December 14, 1973, dismissing the complaints directly to this Court. The Court of Appeals for the District of Columbia Circuit has ordered the plaintiffs' appeal to be stayed until 10 days after the decision of this Court in the government case. This order is reprinted in the Appendix, p. A43.

REASONS FOR GRANTING THE WRIT

The Order and Opinion dismissing the complaint in this case also applied to its companion case, *United States v. National Association of Securities Dealers*, C.A. No. 338-73. In that case, the United States alleges the same violations of the antitrust laws as are alleged by the petitioners herein and names the same defendants as are named herein. Judge Corcoran consolidated briefing and argument on the defendants' motions to dismiss the complaints in this and the government case and, by a single opinion, granted defendants' motions. Because the United States, pursuant to Section 2 of the Expediting Act (28 U.S.C. §29) has appealed directly to this Court, the identical issues presented by the instant petition are already before this Court and granting this petition would not place an additional burden on the Court.

This Court has granted petitions for certiorari prior to the rendition of judgment by the Court of Appeals in similar circumstances. For example, in *Hannah v. Larche*, 363 U.S. 420 (1960), registered voters in the State of Louisiana filed a complaint in the United States District Court for the Western District of Louisana alleging, *inter alia*, that the Civil Rights Act of 1957 was unconstitutional. Because the complaint attacked the constitutionality of the Civil Rights Act, a three-judge court was convened. The three-judge court held that the Civil Rights Act was constitutional but also held that the Commission on Civil Rights was not authorized to adopt rules of procedure which conceal the identity of witnesses testifying before the Commission. The Commission appealed directly to this Court pursuant to 28 U.S.C. §1253. At the same time, a related case, *Hannah v. Shawson*, was heard before a single district judge and the single district judge rendered a decision incorporating by reference the decision of the three-judge panel. The Commission appealed the *Shawson* case to the Court of Appeals for the Fifth Circuit. However, since the *Shawson* case and the *Larche* case raised the

same issues, this court granted a petition for certiorari prior to rendition of judgment by the Court of Appeals thereby permitting the cases to be heard together. 363 U.S. at 422-423.

Similarly, in *Taylor v. McElroy*, 360 U.S. 709 (1959), a writ of certiorari was issued to the United States Court of Appeals for the District of Columbia Circuit prior to argument of the case in that court because a companion case, which raised the same issues, *Greene v. McElroy*, 360 U.S. 474 (1959), was already pending in this Court.

Thus it is established that when a case which is pending before this Court raises the same issues as are raised by a companion case pending in a Court of Appeals, it is appropriate to issue a writ of certiorari prior to judgment in the Court of Appeals. Because the issues presented by this case are identical to those presented by *United States v. National Association of Securities Dealers*, Docket No. 73-1701, now pending in this Court, judicial economy and efficiency mandate that both cases should be heard together. In a similar situation Mr. Justice Blackman wrote:

> "It would be destructive of time and energy for all concerned were we to rule otherwise." *Roe v. Wade*, 410 U.S. 113, 123. (1973)

See also *New Haven Inclusion Cases*, 399 U.S. 418 (1970). Without placing any additional burden on this Court, the granting of the instant writ would eliminate the needless burden on the Court of Appeals occasioned by having to decide petitioners' appeal after the very same issues have been decided by this Court. Thus issuing a writ of certiorari to the Court of Appeals for the District of Columbia Circuit would be in accord with the stated policy of this Court to promote "judicial economy, convenience and fairness to litigants." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966).

Moreover, the Court of Appeals for the District of Columbia Circuit has ordered that petitioners' appeal be stayed until ten days after the decision of this Court in

United States v. National Association of Securities Dealers, Docket No. 73-1701. (Appendix, p. A43) Petitioners, therefore, will be precluded from appealing the decision dismissing their complaint unless this petition is granted.

Finally, issuing the writ of certiorari sought by this petition will bring before the Court private plaintiffs to present arguments on the issues raised by the dismissal of the complaints. These issues, involving alleged antitrust immunity conferred by the Investment Company Act of 1940, are of first impression and are quite complex. It is respectfully submitted that an additional point of view presented by private attorneys general will be of aide to this Court in resolving these difficult and important issues. See *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972).

CONCLUSION

Petitioners submit, therefore, that the interests of judicial efficiency and economy would be served by granting a writ of certiorari in this case.

Respectfully submitted,

David Berger
H. Laddie Montague, Jr.
Joel C. Meredith
Paul J. McMahon
DAVID BERGER, P.A.
Attorneys at Law
1622 Locust Street
Philadelphia, Pa. 19103

and

Charles Jay Pilzer
JACOBS, PILZER & SPEILLER
1101 Seventeenth Street, N. W.
Washington, D. C. 20036

and

Ira Jay Sands
Suite 900
701 7th Avenue
New York, N.Y. 10036
Counsel for Petitioners